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IN THE

Supreme Court of the United States

October Term, 1948

No. 441

AMERICAN SAFETY TABLE COMPANY,
Petitioner,

v.

SINGER SEWING MACHINE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI *

The petition for certiorari seeks review of a judgment entered July 6, 1948, by the Court of Appeals for the Third Circuit. The opinion is reported in 169 F. (2d) 539.**

* This is a companion case to *Universal Oil Products Co.* v. *Root Refining Co.*, Nos. 439-440, this term (the *Universal* cases), see Order April 6, 1948. By order of June 20, 1947, the court authorized the appearance of the United States as *amicus curiae* in this case and the *Universal* cases.

** Petitioner here, as in the *Universal* cases, moved to dispense with printing the record for purposes of its petition for certiorari. Respondent does not oppose this motion; however, Amicus has filed a printed copy of the opinion and reference to pages of that copy will be made in this brief as (Op. —). Pages in trial transcript will be designated (R. —), pages in petition (Pet. —) and proceedings before trial (p.t. —).

In this case the court below conducted an inquiry into the integrity of one of its own judgments, the possible corruption of which was called to its attention by Respondent's (Singer's) petition for reargument of September 26, 1944 (document "A").* Inasmuch as Petitioner (American) fails to set forth in full the pertinent facts in this case, we wish to include herein by reference and call to this Court's attention the facts as set forth in the Government's brief in opposition under heading "Statement", and Singer adopts the same for the purpose of this brief.

Most of Petitioner's "Questions Presented" (Pet. 17, 18) have no foundation in fact. For example, Questions 1, 2 and 6 are based on the erroneous assumption, as we show hereafter, that Singer made no charges of fraud and that the "charges" as set forth by the court below in its order of April 6, 1948, were "framed" by it and have no basis in any statement by Singer or the Government. It is believed that the "Questions Presented" set forth in the Government's brief are the only questions involved in this case, and accordingly Singer adopts them for the purpose of this brief.

ARGUMENT

I.

American seeks in its petition to convey the impression that the court below was bound to act solely on the specific prayer for reargument in Singer's petition for reargument (document "A", Pet. 1, 2, 4, 6, 34). That petition served only to start the present proceedings. Thereafter the court acted in the exercise of its power to determine whether or

* At the suggestion of the court below each printed document filed in this case before the trial was given an identifying letter and these will be used in this brief.

not its judgment of October 17, 1938 was tainted by fraud. The controversy between the private parties was properly relegated to a subordinate position. *Hazel-Atlas Co.* v. *Hartford Empire Co.*, 322 U. S. 238, 246.

Moreover, the record shows that Singer requested (document "N") and American consented to the court's going beyond the mere granting of reargument (Op. 45). As early as June 20, 1947, the court below ordered American to show cause why the judgment of October 17, 1938, should not be set aside, to which American filed a general denial of wrongdoing (document "M").

At the request of the court, Singer and United States filed statements of charges and issues as follows: February 11, 1948 (document "N"); March 2, 1948 (document "P"), and March 23, 1948 (document "R"). Thereafter, on the basis of these documents the court formulated in its order of April 6, 1948, the charges "that have been made and are to be tried" (Op. 43-45).

At a hearing on March 23, 1948, these issues were read aloud and the parties invited to comment (p.t. 148-164).* American did not offer any objection to the issues as stated or to the procedure proposed (p.t. 162, 164).* Subsequently a pre-trial conference was held at which the question was discussed whether the inquiry should be limited to the propriety of granting a reargument. The court below concluded and announced, with the assent of the parties, that the case would be heard on the issues formulated and set forth in its order of April 6, 1948, and that the court would not restrict itself to ordering a reargument of the appeal if the charges were sustained (Op. 45). Thus, the court below wisely insisted that the charges and issues be plainly and fully set forth before the trial.

* Record of pre-trial hearing of March 23, 1948.

However, it is not necessary to plead fraud which has been perpetrated on the court. In *Primeau* v. *Granfield*, 193 F. 911 (C. C. A. 2), fraud was first asserted in the appellate court by Granfield. Primeau argued that because that issue was not raised in the pleadings it should not be considered. As to this the court said (p. 913):

> "But from the very nature of the fundamental principles involved it is manifest that the question is deeper than one of pleading. The court must consider it not because it is a matter of defense to the defendant but because it is against public policy to hear the case if the charge be established. The court acts for its own protection rather than for the protection of the defendant. When fraud or illegality is disclosed in a case, public policy requires a court to refuse its aid irrespective of the state of the pleadings and regardless of the fact that with fraud and illegality absent the plaintiff might appear entitled to relief. McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Memphis Keely Inst. v. Leslie E. Keeley Co., 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921; Teoli v. Nardolillo, 23 R. I. 87, 49 Atl. 489; Drake v. Lauer, 93 App. Div. 86, 86 N. Y. Supp. 986.
>
> "It is our duty then to examine into the charge of fraudulent conspiracy notwithstanding that it is not set up in the pleadings, and if we find it established we shall be constrained to shut the door of the court against the plaintiff in limine without passing upon the merits of his demand for an accounting."

See also:

Bentley v. *Tibbals*, 223 F. 247 (C. C. A. 2);

Bell & Howell Co. v. *Bliss*, 262 F. 130 (C. C. A. 4);

Renaud Sales Co. Inc. v. *Davis—Davis* v. *Renaud Sales Co. Inc.*, 104 F. (2d) 683 (C. C. A. 1);

General Theatres, Inc. v. *Metro-Goldwyn-Mayer Dist. Corp., et al.*, 9 F. S. 546, 549 (D. C. Colorado).

Thus, it is clear that the court below was not limited to Singer's petition for reargument, but had the power and the duty to formulate the issue on the basis of the record as made by the parties prior to the order of April 6, 1948. These issues were so formulated and tried not only with the consent of all parties concerned but after submission to all parties with a request for suggestions and objections if any.

II.

(a) A court's power to inquire into the integrity of its own judgment is settled. See *Root* v. *Universal*, 328 U. S. 575, 580, where this Court said:

> "The inherent power of a federal court to investigate whether a judgment was obtained by fraud is beyond question. Hazel-Atlas Co. v. Hartford Empire Co., 322 U. S. 238."

(b) That such an inquiry is not foreclosed by the expiration of the term is also settled. See *Hazel-Atlas* v. *Hartford Empire, supra* (p. 245), where this Court said, after discussing the question of "term" at some length:

> "But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away."

(c) The court below had the right to hear evidence and decide disputed questions of fact in this case. See the *Universal* case (p. 580) where this Court said:

> "The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation."

Since a court has the power to inquire into the integrity of its judgment, as stated by Justice FRANKFURTER in the *Universal* case, it is unrealistic to suggest that this power does not include the right to hear evidence on the question of whether or not its judgment has been fraudulently obtained.

In the *Hazel-Atlas* case it was held (pp. 249-250) that the Circuit Court had both the duty and the power to vacate its own fraudulently obtained judgment, on the basis of a record made up of opposing affidavits presented by the parties. Certainly if the court had the power to act on the basis of affidavits, it had the power to hear oral evidence to ascertain the facts.

Moreover, in the *Universal* case (p. 579) this Court approved the payment of Master White's fees, thus tacitly sanctioning the appointment of a Master. It follows that if the Court of Appeals had the power to appoint a Master to act for it, it had the power to hear and determine for itself.

It is to be noted that Courts of Appeal may exercise original jurisdiction "to aid, protect or enforce their appellate jurisdiction". *Hall, et al.* v. *United States*, 78 F. (2d) 168, 170 citing *United States* v. *Mayer*, 235 U. S. 55, 65, 66. Certainly, to determine whether or not there

is any fraud involved in the Court of Appeals' judgment handed down in 1938 is "to aid, protect, or enforce their appellate jurisdiction".

There is no doubt as to the power of the court below to act as it did in this instance, where all the usual safeguards of an adversary proceeding were scrupulously observed.

III.

The evidence supports the court's finding that American employed Kaufman with the expectation that the latter would "exercise or endeavor to exercise an improper influence upon Judge DAVIS to secure judicial action from him favorable to American's interest in this suit" (Op. 44, 52). The facts as to Kaufman's employment by American are well set forth in the Government's brief in opposition under the main heading, "Argument" and sub-heading "Factual Questions", and Singer hereby adopts such statement by reference and includes it herein. In addition, Singer respectfully calls this Court's attention to the following:

(a) American withheld the fact that it was Becker who recommended Kaufman to the Frankels. At the very first hearing on Singer's petition on March 6, 1945, the court asked who recommended Kaufman to the Frankels. Counsel for American said he did not know but, "I can find out" (p.t. 44, 45).* However, it was not until the Spring of 1948 at the examination of Harry Frankel by the Government that the answer to this very pertinent question was brought out into the open (R. 2727). The concealment for three years of this important fact is consistent neither with a sense of innocence nor with American's protestations of complete frankness (p.t. 33, 34).* Becker was attorney for

* Record of hearing on Singer's petition for reargument—March 6, 1945.

William Fox, confessed briber of Davis during the very time when Fox was bribing Davis and during the time when the scandalous Fox bankruptcy proceedings were in progress in the New Jersey courts (Op. 48, 49). The record shows that at one time the Frankels were friends and business partners of William Fox and through him became friendly with Murray Becker (R. 2727, 2736, 2743).

(b) American argues (Pet. 8, 9) that the dishonest relationship between Kaufman and Davis was not common knowledge at the time they retained Kaufman and that therefore they could not possibly have had any evil intent in doing so. But the critical fact is not whether the relationship of Kaufman and Davis was common knowledge but whether it was known to Becker who was a friend of the Frankels and who recommended Kaufman. Kaufman and Davis were intimate and notoriously so and Becker was well known to Kaufman (Op. 49, R. 2628). The Frankels, Fox and Becker, were old acquaintances (R. 2555, 2556) and they must have known of the relationship between Davis and Kaufman (Op. 49). The hiring of Kaufman, despite the fact that he could furnish no legitimate services, has never been explained and is strong evidence that they had some such knowledge (Op. 50, R. 2593). The Frankels acted most promptly when Murray Becker said to them in regard to Kaufman, "I got just the man for you" (R. 2597).

In spite of the fact that Louis Frankel made a trip to New York for the purpose of consulting with the family's old time legal adviser, Mr. Otterbourg, he did not do so. Instead, the Frankel brothers visited with Becker and accepted his recommendation of Kaufman, without consultation with Mr. Otterbourg, or with other members of his firm, or with the Frankels' New York patent lawyers, Levensohn, Niner & Levensohn (R. 2593, 2597, 2730).

(c) In trying to explain the hiring of Kaufman, American stresses the fact that Kaufman had correspondence in regard to the accounting proceedings and some minor and ancillary matters from about 1938 until 1941 (Pet. 15, Op. 51, 52). It should be remembered, however, that at that time Kaufman had a 25% interest in what he and the Frankels hoped would be a very substantial recovery (R. 2616, Op. 51). This accounts for his being kept informed as to the proceedings even though he performed no legal services and was not expected to do so (Op. 51, 52).

(d) American makes much of the fact that Kaufman was able to secure the services of Darby and Haight for only $3,500 and claims that they could not have done this directly. This argument is fallacious because Stoughten, American's patent attorney, knew Darby and Haight, and could have brought them into the case (R. 2606). By having Kaufman do it, American paid $6,500 and gave a contingent 25% in the recovery (Op. 51). This would have amounted to a large sum if American's claim was ultimately sustained, as well it might have been, when the case went back to Judge DAVIS' court on appeal in the accounting. Such extraordinary fees are not given one having "no ability" in the particular case unless success is practically assured.

IV.

Petitioner has no *right* to a review (Pet. 28) and because of the circumstances of this case should not be granted a review as a matter of grace.

The present proceeding is primarily a hearing by the Court of Appeals of the Third Circuit into the integrity of one of its own judgments and except for obvious error (not shown here) should not be disturbed by this Court. In this instance, American had a complete and fair hearing

of an unusual nature, in that it was before three judges, SOPER, MAHONEY and PRETTYMAN, experienced in both trial and appellate work. There was no dissent; the decision was unanimous. Preliminary hearings were had; the parties were heard and had an opportunity to discuss and suggest proposed procedure. The Government was enjoined to produce all the evidence, regardless of whether it pointed to guilt or innocence. The parties were privileged to call or have the Government call any witnesses they desired. All parties were given opportunity to examine or cross examine fully. After the trial, lengthy arguments were heard by the court, with practically no limitation on the time which the parties were given. Only after thus hearing the evidence, seeing the witnesses and listening to argument did the court hand down its opinion. In view of the unusual constitution and experience of the court and the fact that the court's findings are fully and amply supported by the evidence, they should not be disturbed.

Petitioner's fourth reason relied on for the allowance of the writ (Pet. 18, 19) has no basis in fact, because the court below purposely refrained from deciding whether or not Kaufman actually succeeded in exerting an improper influence on Judge DAVIS (Op. 53, 54). It only found that American hired Kaufman with the expectation that Kaufman would do so (Op. 52). Petitioner's statement that "The decision below adjudicates corruption on the part of a former judge of that court" is not a correct statement of the court's ruling herein.

Conclusion

The findings of fact are amply supported by the evidence and the petition fails to point out any sufficient ground for granting the writ. Therefore, it is respectfully submitted that the petition should be denied.

NEWTON A. BURGESS,
JOHN F. RYAN,
REGINALD HICKS,
Counsel for Respondent.

Dated: Dec. 29, 1948.